

DOCUMENT RESUME

ED 166 342

UD 019 142

TITLE Update on Title IX and Sports No. 2. HEW Proposed Policy Interpretation Concerning Title IX and Athletics.

INSTITUTION Association of American Colleges, Washington, D.C. Project on the Status and Education of Women.

SPONS AGENCY Carnegie Corp. of New York, N.Y.; Ford Foundation, New York, N.Y.

PUB DATE Jan 79

NOTE 5p.; For a related document, see ED 157 482

EDRS PRICE MF-\$0.83 HC-\$1.67 Plus Postage.

DESCRIPTORS *Athletic Programs; Discriminatory Attitudes (Social); *Educational Legislation; *Educational Policy; *Equal Education; Females; *Finance Reform; *Sex Discrimination

IDENTIFIERS *Education Amendments 1972 Title IX

ABSTRACT

In this paper, the proposed policy interpretation regarding Title IX and intercollegiate athletics and a review of the issues as viewed by women's groups are summarized. The basic concept underlying the draft policy is that an institution will be presumed to be in compliance with the Title IX athletic regulations if it can demonstrate that it (1) "has eliminated discrimination in financial support and other benefits and opportunities in its existing athletic programs" and (2) "follows an institutional policy that includes procedures and standards for developing an athletic program that provides equal opportunities for men and women to accomodate their interests and abilities." Responses of women's groups to eight selected questions suggest that the proposed interpretation provides maximal flexibility for institutions at the expense of women's equity, that numerous loopholes are detailed (allowing almost any discrepancy to be justified by the nature or level or scope of compensation), and that no examples of violations are given, although there are many examples of how discrepancies can be justified. (WI)

*****X*****

* Reproductions supplied by EDRS are the best that can be made *

* from the original document. *

STAFF

Director	Bernice Resnick Sandler	Staff Assistant	Marilyn Lyons
Assoc. Director	Grace L. Mastalli	Staff Assistant	Michelle Simon
Staff Assistant	Jean O'Gorman	Staff Assistant	Mary McLaren
	Administrative Associate	Mary De Mouy	

project on the status
and education of**women****UPDATE ON TITLE IX AND SPORTS #2**U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY.

**HEW PROPOSED POLICY INTERPRETATION
CONCERNING TITLE IX¹ AND ATHLETICS**

On December 6, 1978 the Department of Health, Education and Welfare (HEW) issued new policy interpretations regarding Title IX and intercollegiate athletics. HEW has invited comment from interested individuals and groups. The comment period ends on February 10, 1979.

According to a press statement by Secretary of HEW, Joseph Califano, a number of circumstances relating to the development and operation of college sports were taken into account in drafting the proposed policy interpretation. These factors included that:

- Historically, most colleges and universities have emphasized intercollegiate sports for men. In the 1976-77 academic year 4,448,028 men (52.3%) and 4,065,282 women (47.7%) attended the nation's institutions of higher education. At the same time, 395,000 students participated in intercollegiate athletics; of these, 290,000 (74%) were men, but only 105,000 (26%) were women. On the average, colleges and universities provide approximately 10 sports for men and only 6 for women.
- Women who participate in intercollegiate athletics often do not receive their fair share of athletic resources, services and benefits. For example, disproportionately more financial aid has generally been made available for male athletes than for female athletes.

- Despite these limitations, the number of women participating in athletics has increased sharply. During the period from 1971 to 1976, the enrollment of women in the nation's institutions of higher education rose from 3,742,000 to 5,201,000, an increase of 39%. During this same period, the number of women participating in intramural sports increased from 276,167 to 576,648, an increase of more than 100%. In intercollegiate sports, women's participation increased from 31,852 to 64,375, again an increase of more than 100%. These figures dramatize two points: the growing interest of women in athletics and the efforts of colleges and universities to respond to that interest.

At the time of the policy interpretation's issuance, HEW had over 90 unresolved complaints of sex discrimination in the athletic programs of more than 60 colleges and universities.

This paper includes a summary of the proposed policy and a review of the issues as viewed by women's groups which should be of help to institutions and others wishing to comment on the policy interpretation.

¹ Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally assisted education programs.

The Project on the Status and Education of Women of the Association of American Colleges provides information concerning women in education, and works with institutions, government agencies and other associations and programs related to women in higher education. Funded by Carnegie Corporation of New York and The Ford Foundation, the Project develops and distributes free materials which identify and highlight issues and federal policies affecting women's status as students and employees. This publication may be reproduced in whole or in part without permission, provided credit is given to the Project on the Status and Education of Women, Association of American Colleges, 1818 R Street, N.W., Washington, D.C. 20009.

SUMMARY OF HEW'S PROPOSED POLICY INTERPRETATION FOR IMPLEMENTING TITLE IX IN INTERCOLLEGIATE ATHLETIC PROGRAMS*

Introduction: The Standard of Presumed Compliance

The basic concept underlying the draft policy is that an institution will be presumed to be in compliance with the Title IX athletic regulations if it can demonstrate that it:

- Part I "has eliminated discrimination in financial support and other benefits and opportunities in its *existing* athletic programs;" and
- Part II "follows an institutional policy that includes procedures and standards for developing an athletic program that provides equal opportunity for men and women to accommodate their interests and abilities."

PART I

In assessing *existing* program compliance HEW will initially determine whether the institution's average per capita expenditures for men and women are substantially equal for those items which are "financially measurable" (i.e., scholarships, recruitment, equipment and supplies, travel and per diem, publicity, etc.). Scholarships and recruiting expenditures will be considered separately and all other "financially measurable" items as a group (if an institution is in compliance in this group, HEW will not separately examine the component parts.) Average per capita expenditures will be calculated by dividing total expenditures on these items for each sex by the total number of participating athletes of each sex.

<i>For Example:</i>	<i>Men</i>	<i>Women</i>
# intercollegiate athletes	300	150
amount of athletic aid	\$100,000	\$ 50,000
per capita award	333	333
"financially measurable" items	300,000	150,000
per capita expenditure	1,000	1,000

Per capita expenditures for males and females may, according to the HEW draft, be permissibly disparate if the disparity is the result of "nondiscriminatory" factors. Examples of "nondiscriminatory" factors included

* The substance of this summary was prepared by Margot Polivy, Esq., for the Association for Intercollegiate Athletics for Women.

in the HEW draft are as follows: the nature of the sport (e.g., differing cost of equipment), difference in cost of in-state versus out-of-state tuition and recruitment, differences in "nature," "level" and "scope" of competition for males and females.

For those components that are not as readily financially measurable, the proposed policy would require "comparable" benefits and opportunities. These areas subject to comparability would include opportunities to compete and practice (facilities and game schedules must be equally convenient for men and women); opportunity to receive coaching (ratio of full-time coaches or equivalent is substantially equal for men and women) and academic tutoring (available on a nondiscriminatory basis); provision of locker room, practice and competitive facilities (may either share time on existing facilities or upgrade women's facilities); provision of medical and training services and facilities (insurance may vary by sport but must offer similar benefits to men and women; medical and training services and facilities must be available to both); and provision of housing and dining services and facilities (separate dorms may be provided men but not women and vice versa but cannot offer additional services or benefits to one but not the other).

PART II

Part II of the draft policy is designed to ensure that as the interest and abilities of women students increase, school athletic program offerings also increase. If an institution does not have an established operating policy for accommodating increased interests and abilities, it would have to demonstrate that: its athletic program is providing opportunities for women comparable to those of men at all levels (club, intramural and intercollegiate); there is an institutional pattern of increased participation by women in athletic activities at all levels; or that an institution's athletic program reflects the regional or area interscholastic growth pattern.

If an institution cannot demonstrate that it complies with the equal per capita and comparability standard of Part I and the future growth provisions of Part II, it will not be presumed to be in compliance with Title IX. The institution would then be required to demonstrate that the disparities in funding or other benefits and services are caused by "nondiscriminatory" factors.

(Note: Contrary to some media coverage, the proposed policy interpretation does *not* exempt football from coverage by Title IX.)

SELECTED ISSUES BEING RAISED BY WOMEN'S GROUPS CONCERNING THE PROPOSED POLICY INTERPRETATION ON TITLE IX AND INTERCOLLEGIATE ATHLETICS

General Comments

- Eight questions are posed concerning the proposed interpretation. Women's groups note that the questions focus on whether or not the proposed policies are *practical* rather than whether or not they would bring about equity. They also are fearful that framing of the questions this way may lead to a justification of the status quo, i.e., it is always more "practical" to maintain the status quo than to change it.
- Women's groups claim that the proposed interpretation provides maximal flexibility for institutions at the expense of women's equity. Numerous loopholes are detailed; apparently almost any discrepancy can be justified by the nature or level or scope of competition. No examples of violations are given, although there are numerous examples of how discrepancies can be justified.¹

SELECTED ISSUES

• Differences in Scope of Competition

Differences in average per capita expenditures may be justified by differences in the scope of competition. For example, expenses may be greater on a per capita bases for competition at the national level than they might be at the local or regional levels. Despite a provision that institutions must be upgrading the levels of competition available to women's teams, many women's groups are concerned that the policy does not provide sufficient incentives to actually do so. Institutions might artificially restrict the development of women's teams to keep costs down. Some groups suggest that institutions which are not offering comparable levels of competition to men's and women's teams should be required to demonstrate in writing how the present levels of competition do effectively accommodate the interests and abilities of men and women equally, as per Section 86.41(c)(i) of the Title IX regulation. These same groups suggest that, if this cannot be demonstrated, the institution be required to show in writing, with specific goals and procedures, how it will upgrade competition for men and what the time frame is for reaching parity.

¹ Editor's Note: The proposed deals with *overall* equity, and as such, follows the Title IX regulation. One practical consequence of this is that men and women competing in identical sports may be treated very differently. For example, the members of a men's swim team could receive full ride scholarships while the members of a women's swim team did not, provided that the *overall* per capita financial aid was the same for men and women. Some persons feel that this constitutes a failure to protect *individual* men and women from discrimination, since they may be treated unequally within the same sport. Others perceive the problem differently and note that because of differences between existing men's and women's programs, interests, and abilities, equity can only be assessed by comparing men and women as *groups*. Since both the regulation and the policy support this latter view, it can be said that they view individual rights as secondary to group rights, and that the emphasis is on the larger group (all women athletes in a program) as opposed to a smaller group (those participating in a particular sport).

• Differences in the Nature of a Particular Sport

Differences in average per capita expenditures for financially measurable benefits and opportunities can also be justified by differences intrinsic to the nature of the sports involved. Because sports played by both men and women have no significant cost difference based on sex, it is clear that the primary targets of this provision are those sports which are traditionally played by only one sex. Of the few such sports found on campus, football is unique for its high cost on a per capita basis. Many women's groups, therefore, regard this as a partial "de facto" exemption for football, especially since the criteria for determining whether a cost is "intrinsic" to a particular sport are not spelled out. These groups suggest that *such costs should be explicitly limited to expenses directly incurred by athletes as they participate in the particular sport*. This would permit the costs of game equipment or uniforms to be taken into account, but would prevent peripheral costs such as advertising, travel of wives to games, or the underwriting of "pep rallies" from being considered as justified by the "nature of the sport."

• Differences in Per Capita Expenditures

Moreover, women's groups suggest that where valid expense differences do occur and result in different per capita expenditures, that the amount of the difference be made available for the other sex for use in another part of their program. The monies could be used, for example, to expand recruiting or scholarships. Such a requirement would reduce any tendency to develop low cost sports for women (and high cost sports for men) because the institution would be forced to make the same level of financial investment regardless of the particular costs of any sports.

• Measurement of Compliance in Overall Terms

"In evaluating per capita expenditures for financially measurable benefits and opportunities, the Department will examine expenditures for athletic financial assistance and recruitment individually and will examine all other financially measurable items—equipment and supplies, travel and per diem, publicity, etc.—as a group." (Emphasis added.) Institutions do not have to provide equity within any particular category of financially measurable item other than aid and recruitment as long as these financially measurable items are equal overall (apart from differences otherwise allowed in the policy interpretation). Thus, an institution could send its male athletes to games via first class airfare and women athletes by economy class, provided that the *total* per capita travel and other financially measurable items (i.e., publicity, equipment and supplies) for men and women were the same. Some women's groups claim that allowing disparities between the money spent on men and women *within a particular category* (such as travel) is discriminatory, even if the *overall* dollar amount for the grouped items is equal. Others feel that the equity within a particular category is not

so important as the overall equality in expenditures for the *group* of items listed, and that group averaging will allow for flexibility in developing women's programs.

- **Examples of Justifiable Disparities in Expenditures**

The policy interpretation gives numerous examples of how institutions may justify disparities in expenditures (such as the nature of the sport or the scope of competition). No examples of what constitutes a violation are given. Examples of disparities in expenditures which are not justifiable and which violate Title IX need to be specified so that institutions will have a clearer picture of what is *not* allowed.

- **Financial Assistance**

In general the average per capita amounts of financial assistance for men and women must be the same. The average per capita expenditure is computed on the basis of the *total number of athletes* rather than the *number of athletes receiving the benefit involved* (e.g., financial aid). Thus the manner in which expenditures are made for men and women can differ substantially. For example, the men's program might concentrate scholarships on a limited number of athletes while the women's program might spread its awards more thinly over a larger number of athletes. In such cases it would be possible for women to receive smaller average awards than men, although a higher percentage of women would receive awards. Some argue that allowing unequal amounts for individual men and women is discriminatory, even though the *average* per capita for men and women are the same. Others argue that allowing individual differences in amounts (as long as the average per capita is the same) provides for greater flexibility in determining athletic programs.

Additionally, discrepancies in per capita expenditures for athletic financial assistance are allowed if an athletic director decides "not to award the usual number of scholarships in a particular year because he/she believes that some should be deferred until a later year for purposes of program development." There is no time limit on the deferral nor is there any requirement that the funds actually be carried forward and kept available for the particular sex which does not receive the aid. Thus a director could technically decide to defer some or even *all* women's awards in a particular year, claiming that "next year" would be a better time to encourage a particular women's sport. Women who are denied scholarships that year as a result of that programmatic decision would have no recourse whatsoever, despite the resulting unequal per capita expenditures.

- **Provisions of Housing and Dining Services**

"An institution may provide a separate dormitory for male athletes but not for female athletes so long as there are no additional services or benefits that accrue to residents of the separate dormitory."

Women's groups take the position that there are always benefits which accrue to those housed in separate dormitory facilities, such as increased morale and esprit de corps, increased status for athletes by virtue of separate (even if equal) facilities, and increased opportunities for team members to discuss team events and problems. They note that Section

86.32(a) of the Title IX regulation prohibits institutions from offering "different services or benefits relating to housing." Therefore, they recommend that the policy should not sanction the provision of separate dormitories for athletes of only one sex, especially since no institutional investment is usually required in order to make similar arrangements available for the other sex.

- **Policies to Increase Participation of Women in Sports**

Part II is "designed to eliminate, over a reasonable period, the discriminatory effects of the historic emphasis on men's intercollegiate sports and to facilitate the continued growth of women's athletics . . . funds to comply with Part II can be developed over a longer period of time." Many women's groups perceive the weak language of this part as likely to result in a widespread assumption that the policy authorizes an additional "grace period," but keyed this time to participation rates and levels of competition. The Title IX regulation specifically authorized a three year adjustment period (which ended on July 21, 1978) for postsecondary institutions to bring their athletic programs into compliance. This effort should have included attempts to increase participation rates and to improve levels of competition for women, but the new policy ignores this. Instead, it requires only that inequities affecting present athletes be eliminated immediately, and that institutions have a policy which permits expansion of participation and competitive opportunities for women to move forward at an undefined pace. Theoretically an institution can perpetually continue to plan to increase opportunities for women, and accomplish this at a very slow rate, and still be in compliance; i.e., an institution could take 20 or 30 years to encourage women and increase their participation in sports so long as it showed that some progress was being made. Most women's groups agree that the policy should specify the rate at which improvements should be made in participation rates and levels of competition, and that it should call for comparable participation rates and levels of competition as targets to be achieved within a fixed time-frame. Some women's groups suggest that the draft does not make clear that the procedures required are only to meet future developing interests and abilities and may not be used to excuse an institution's failure to meet already existing and unsatisfied interests and abilities of women students for athletic opportunities. In addition, they say the final policies should clearly state that institutions are responsible for assessing newly developing interests and abilities on an *annual* basis and, consistent with their Title IX obligations, must be able to demonstrate that within one year of this assessment that they have provided the requisite athletic opportunities.

* * * * *

HEW is soliciting comments on the draft policy until February 10, 1979. All comments should be sent to:

David Tatel
Director, Office for Civil Rights
330 Independence Avenue, S.W.
U.S. Department of Health, Education and Welfare
Washington, D.C. 20201

January 1979